In The

Supreme Court of the United States

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1961

No.

In the Matter of Mellen Manufacturing Company,
Bankrupt

Nathaniel Gora,
Appellant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Petitioner, Nathaniel Gora, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit was filed on February 14, 1961, and is unreported as of this date, but is appended to this petition, as is the order of the Court of Appeals, filed February 14, 1961.

The opinion of the United States District Court for the Middle District of Pennsylvania, denying the petitioner's motion for leave to file an amended proof of claim, was filed on March 25, 1960, is unreported, but is set forth in full on pages 15-18 of Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on February 14, 1961, and a copy thereof is appended to this Petition in the Appendix at pages 11-13. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. When admittedly the vast majority of creditors, the trustee, counsel for trustee and various counsel for creditors, as well as the Referee had knowledge of the existence of the claim of a creditor under a Chapter XI proceeding, which proceeding was subsequently converted to a proceeding in bankruptcy, and thereafter said creditor was allowed to fully participate in all the meetings of creditors as well as being advised by the trustee that he contemplated opposing the allowance of said creditors claim by reason of said creditor's alleged failure to make a required contribution to the capital of the debts; and where more than three years after the adjudication the trustee objects because of an alleged failure to file a proof of claim and thereafter the creditor seeks to file a new proof of claim, under the facts and law applicable should the creditor be permitted to participate in distribution of the proceeds in bankruptcy of the debtor corporation?

2. Do the facts reveal evidence to show that a claim was filed either formally or informally.

3. Assuming that the claim was "allowed", may the fact of filing be inferred therefrom.

4. Where the trustee or creditors fail to make a timely objection to a creditor's claim, may they more than three years thereafter raise objections where they have permitted the creditor to act as if they thought his claim was bona fide.

STATUTES, GENERAL ORDERS, AND FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

The pertinent portions of the Bankruptcy Act, 11 U.S.C. 1 (11), 11 U.S.C. 1, 11 U.S.C. 92 (a); 11 U.S.C. 93 (a) and (n); General Order 37 of the Orders of the Supreme Court promulgated under the Bankruptcy Act, and Federal Rule of Civil Procedure 15 (a) are set forth in the Appendix at pages 19-21.

STATEMENT OF THE CASE

This case was originally presented to the United States District Court for the Middle District of Pennsylvania upon Petitioner's petition to review the order of the Referee denying petitioner the right to amend or perfect his claim. The petition for review was authorized by the terms of 11 U.S.C. 67(c). The District Court sustained the action of the Referee and thereafter petitioner appealed to the United States Court of Appeals for the Third Circuit pursuant to the provision of 11 U.S.C. 47.

The basic facts which are not in dispute, are as follows:

On December 4, 1953, the debtor company, Mellen Manufacturing Company, filed its Petition for Arrangement under Chapter XI; Appellant, Nathaniel Gora, was a creditor of the debtor company in the amount of $125,000.00

(20a). This indebtedness was reflected on the books of the debtor and was further noted in the Schedule of Debts owed by the debtor corporation and filed with the Referee (20a). Furthermore, the Court, through the Referee, Creditors' Committee and various other creditors and their counsel, all had knowledge of Appellant's claim (20a).

The claim of Appellant was mentioned in various hearings before the Honorable Albert H. Aston, then Referee in Bankruptcy, and particularly in the proceedings had before him on March 24, 1954 (17a, 20a). The plan of reorganization, as agreed to by the creditors of the debtor company, specifically referred to Appellant's claim and included a proposal for its subordination (17a, 20a). Subsequently, on November 3, 1954, debtor was adjudicated a bankrupt (21a, 28a). The Appellant participated in the first meeting of creditors at which a Trustee was elected and in subsequent proceedings (21a).

During all of the proceedings, both prior to and subsequent to the adjudication, the Trustee, as well as other interested parties, from time to time made reference to the debt owed by the debtor company to Appellant (21a). In fact, the Trustee on January 20, 1955, advised counsel for Appellant that he contemplated opposing the allowance of Appellant's claim by reason of Appellant's alleged failure to make a required contribution to the capital of the debtor company (21a).

The Court's attention is respectfully directed to the transcript of the proceeding before the Hon. Albert H. Aston, then Referee in Bankruptcy, in Court Room No. 2, Williamsport, Pennsylvania, held on March 24, 1954 (17a). When an arrangement under Chapter XI was being discussed, counsel for Appellant made specific mention of the

fact that all the creditors had agreed that Appellant's claim was to be subordinated to the claims of other unsecured creditors (18a). After affording all parties present an opportunity to object either to the amount claimed by Appellant or the plan of arrangement and no objection forthcoming, the Referee then declared:

> "A general notice will not go out to the creditors. Those whose names are set forth in the debtor petition are to be paid whether they file or not, but on the basis of the amount set forth in the debtor's petition or in his amended list, so that those who do not file claims will be paid on the amount set forth in the petition, and those who do file will be paid on the basis of the amount of the claim". (19a).

The record is thus abundantly clear as to the original order pertaining to filing. The record is also quite clear that neither the Trustee nor his counsel raised any objection to Appellant's claim until almost three years after the adjudication date as to a failure to file (23a).

It is the contention of claimant Gora that formal proofs of claim were, in fact, filed with the Referee in Bankruptcy within six months of the date debtor was adjudicated a bankrupt. However, claimant is unable to prove more than the preparation of, signature to and acknowledgment of the proofs of claim. Counsel for claimant are reasonably certain that the proofs were either mailed to the Referee or filed with the Referee at one of the hearings held subsequent to the adjudication date within the statutory period.

REASONS FOR GRANTING THE WRIT

I. The Decision of the United States Court of Appeals for the Third Circuit Conflicts With the Decision of the United States Court of Appeals for the Second and Fourth Circuits on the First Question Involved

The decision of the Court below involves a direct conflict with decisions of the Courts of Appeals for the Second and Fourth Circuits, viz, *In re Salvator Brewing Co.*, C.C.A. 2, 193 F. 989, 26 A.B.R. 21 (1912); *In re Weco Equipment, Inc.*, 55 F. Supp. 532, aff'd sub. nom. *Public Operating Corporation v. Schneider*, C.C.A. 2, 145 F. 2d 830 (1945); *Cotton v. Bennett*, C.A.A. 4, 59 F. 2d 373, 21 A.B.R. (ns) 126 (1932), cert. den. 287 U.S. 646, 53 S. Ct. 92, 77 L. Ed. 559 (1933); *Scottsville National Bank v. Gilmer*, C.C.A. 4, 37 F. 2d 229, 15 A.B.R. (ns) 125 (1934); *In re W. H. Calder Co.*, 146 F. Supp. 389 (E.D. N.C., 1956), aff'd sub. nom. *Fyne v. Atlas Supply Company*, C.A. 4, 245 F. 2d 107 (1957).

In those cases it was held that the failure to file a formal proof of claim within the period of limitations of section 57(n) of the Bankruptcy Act (11 U.S.C. 93) (n) did not bar the aftertime filing or amending of the claim. All these cases proceeded on the theory that so long as the formal claim does not introduce a new or different claim but merely serves to make effective that which, in some form, was asserted in the original claim, which was ineffective, solely, because it failed to comply literally with

the statute, the nunc pro tunc filing or amendment would be permitted.

The decision of the Court below clearly recognized that a conflict exists between its decision and those of the Second and Fourth Circuits. It noted that its rule is stricter than the other circuits. However, there is cited in Petitioner's brief numerous District Court cases from other circuits indicating a liberal interpretation is to be desired. The decision of the Court below conflicts with the decisions from the Second and Fourth Circuits on this extremely important point of bankruptcy law and thus gives rise to the necessity for the settlement by this Court of the disputed question.

Moreover, the decision below probably limits the holding of this Court in *J. B. Orcutt & Co. v. Green*, 204 U.S. 96, 27 S. Ct. 195, 51 L. Ed. 390 (1903). This Court in the cited case indicated that a liberal construction was to be given to the statutes permitting aftertime amendment of claim. It is respectfully submitted that the decision below completely perverts the clear intention of this Court by unduly restricting a creditor in the perfection of an otherwise valid claim.

II. The Questions Presented by This Case Are of Great and Recurring Significance in the Administration of the Bankruptcy Act

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The Court below approved the action of the Referee and the District Court whereby petitioner was deprived of a claim of $125,000.00 more than three years after his first participation in bankrupt's affairs. This appears to

be highly inequitable and in conflict with the stated principles of this Court that a Bankruptcy Court is a Court of equity and should prevent substance from giving way to form and technical considerations from prevailing over substantial justice. *Bardes v. First National Bank of Hagarden*, 178 U.S. 524, 535, 20 S. Ct. 1000, 44 L. Ed. 1175 (1900), *Pepper v. Litton*, 308 U.S. 295, 304-305, 60 S. Ct. 246, 81 L. Ed. 281 (1939).

The serious questions of public policy involved here and the effect of the decision below, if unreversed, upon the traditional and inherent powers of a Bankruptcy Court as a Court of equity to do equity makes this case a peculiarly appropriate one for the exercise of this Court's discretionary jurisdiction.

The decision of the Court below constitutes a holding that unless the requirements of section 57 of the Bankruptcy Act (11 U.S.C. 93) are strictly complied with, an otherwise valid and legitimate claim may be forever barred if not corrected within the time set forth in the statute. The decision below unduly emphasizes the rigid requirements of "a proof of claim" to the exclusion of amendment. It is respectfully submitted that in the absence of a clearly expressed legislative intent so to do, and in the light of the liberal general rule regarding amendment (Federal Rule of Civil Procedure, Rule 15, applicable under General Order 37), such a construction—as Mr. Justice Holmes speaking for the Court said in *Hutchinson v. Otis, Wilcox & Co.*, 190 U.S. 552, 555, 23 S. Ct. 778, 47 L. Ed. 1179 (1903): "is too narrow". This narrow view if allowed to prevail will seriously hamper the administration of the bankrupt's estate and the equitable distribution thereof.

Petitioner respectfully urges this Court to exercise its inherent powers of supervision over the administration of the Bankruptcy Act by the lower Courts and decide whether a creditors claim may be barred for failure to meet all the formal requirements of a proof of claim where he has been treated by the creditors, trustee, and Referee as though he had fully complied by filing the same.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

ARTHUR MARKOWITZ,

Attorney for Appellant-Petitioner

141 East Market Street,
York, Pennsylvania.

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Third Circuit

No. 13,248

In the Matter of
MELLEN MANUFACTURING COMPANY, Bankrupt
NATHANIEL GORA,
Appellant

Appeal from the United States District Court for the Middle District of Pennsylvania.

Argued January 23, 1961
Before Goodrich, McLaughlin and Kalodner,
Circuit Judges.

OPINION OF THE COURT

(Filed February 14, 1961)

By Goodrich, *Circuit Judge.*

This is an appeal by the claimant in a bankruptcy case. The Mellen Manufacturing Company on December 4, 1953, filed a petition for arrangement under Chapter XI. Nathaniel Gora, the President of the company, claimed to

be a creditor of the debtor company in the amount of $125,000.00. On November 3, 1954, the debtor was adjudicated a bankrupt.

This case comes to the Court on one point only. The Referee refused to permit the claimant to file amended claims submitted August 8, 1958. The claimant frankly admits that he is unable to prove more than a preparation of, signature to and acknowledgment of the proofs of claim. In other words, there was no proof that the claims had been filed within the statutory period in which filing is required. "Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed . . ." 11 U.S.C.A. §93(n).

The appellant urges that his claims were known to all parties in the reorganization proceedings. He says that he was present and participated in the initial meeting of creditors at which a trustee was elected. Further, he says, neither the trustee nor his counsel made any objection to his failure to file until almost three years after the adjudication date.

We do not regard the question as an open one in this Circuit. In the case of *In re Supernit, Inc.*, 186 F. 2d 130 (1950), the question of timeliness in filing proofs of claim was discussed by the Court through an opinion by Chief Judge Biggs. It was pointed out that the rule in this Circuit even prior to the 1938 amendments has been stricter than that in other circuits. It was also stated that the statute of limitations was the result of abuses which "Congress has continuously sought to avoid . . ." 186 F. 2d 132. It is pointed out that "Expeditious administration was a prime objective of the 1938 amendments"

(186 F. 2d 132) and that this Court found indications that the Congressional intent was that the periods of limitation set up were to be strictly enforced. "Modern administration requires a definitive cut-off date past which claims may not be filed," said the Court. 186 F. 2d 133. It is true that this decision had to do with a filing of claims in a reorganization proceeding but everything said is applicable here also. See, likewise, *In re Super Electric Products Corp.*, 200 F. 2d 790 (3d Cir. 1953). Unless we are to overrule thoughtfully considered precedents in this Circuit the decision must stand. We have no inclination to overrule what we have thus thoughtfully considered.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 13,248

In the Matter of MELLEN MANFACTURING COMPANY, Bankrupt

NATHANIEL GORA,

Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania.

Present: Goodrich, McLaughlin and Kalodner,

Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Ida O. Creskoff

Clerk

February 14, 1961

APPENDIX C

UNITED STATES DISTRICT COURT

For the Middle District of Pennsylvania

No. 10896

In Bankruptcy

In the Matter of Mellen Manufacturing Company, Bankrupt

OPINION OF THE DISTRICT COURT

This matter is before us on a petition for review of an Order of the Referee denying one Nathaniel Gora (hereafter referred to as claimant) the right to file proofs of claim and disallowing same. Actually there is no record of any proofs of claim being filed within the statutory period for filing and the petition was to obtain the filing, nunc pro tunc, after the statutory period for filing had expired. The Referee held that "the motion of claimant's counsel for permission to file the claims in dispute must be denied."

On December 4, 1953, the Mellon Manufacturing Company filed its petition for an arrangement under Chapter XI of the Bankruptcy Act. Subsequently, on November 3, 1954, it was adjudicated a bankrupt.

Claimant contends that the indebtedness was reflected on the books of the debtor company and was also noted in the schedule of debts owed by debtor corporation filed with the Referee, and that the Creditors' Committee, Counsel for said Committee, various creditors and their Counsel had knowledge of said claim.[1]

During the course of the proceedings references, some in the nature of opposition thereto, were made to the claims which it was known the claimant was making. However, no actual proofs of claim as required by the Bankruptcy Act were filed within the six months period. In fact, it was not until August 8, 1958, that the formal proofs of claim were submitted for filing.

Claimant, giving him the most favorable construction, is unable to prove more than that he prepared, signed and acknowledged proofs of claim. He cannot establish that they were ever delivered to either the Referee or Trustee, or to anyone authorized to receive them on their behalf. The burden of showing such a delivery was upon claimant.[2] In the alternative, claimant says that they may have been mailed. There is no proof that they were so mailed, but assuming there was evidence to that effect, the answer is well stated in In re Beattie, D.C. W.D. Mich., 102 F. Supp. 107, 110-111, where the court said:

> "Assuming that proof of its claim was mailed to the referee within the statutory period for filing claims, that fact cannot aid the petitioner. The law is

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[1] If the existence of such a claim on the books of the corporation were material, it should be noted that claimant controlled the corporation.

[2] In re Super Electric Products Corp., 3 Cir., 200 F. 2d 790.

well established that the proof of claim must be *filed* within the statutory period and that merely placing a proof of claim in the mail properly addressed to the referee does not satisfy the filing requirement of section 57, sub. n of the Bankruptcy Act. In the case of In re R. B. Rose Co., Inc., D.C., 43 F. 2d 446, 447, the court said: 'Section 57, sub. n * * * provides that "claims shall not be proved against a bankrupt estate subsequent to six months after the adjudication * * *." There is no statute authorizing the mailing the proof of claim or providing that mailing is sufficient. The creditor who selects the mail as a vehicle for filing his proof of claim assumes the risk of loss or miscarriage. This is a well-known rule, and the fact that the lost paper is a proof of claim for filing with a referee in bankruptcy creates no exception.'"

The fact that claimant was listed in the schedules as a creditor, that the Referee, Trustee and numerous other creditors knew that claimant contended that he was a creditor and in fact had discussed and disagreed with the correctness or validity of the claim and similar circumstances are not the test. In In re Supernit, Inc., 3 Cir., 186 F. 2d 130, 132, involving a similar situation, the law for this Circuit was clearly established that the provision of the Bankruptcy Act involved "is clearly a statute of limitations and is to be considered as a bar to a creditor who has not filed a proof of claim within the period specified." To the same effect is In re Super Electric Products Corp., 3 Cir., 200 F. 2d 790.[3]

[3] See also, W. F. Sebel Co., Inc. v. Hessee, 10 Cir., 214 F. 2d 459, 461; In re Seeley Tube & Box Co., D.C. N.J., 120 F. Supp. 269.

The action of the Referee will be affirmed.

(s) Frederick V. Follmer
United States District Judge

March 25, 1960

ORDER

NOW, to wit: March 25, 1960, for the reasons set forth in Opinion this day filed, It is Ordered and Decreed that the Order of the Referee in Bankruptcy denying the motion of claimant, Nathaniel Gora, for permission to file proofs of claim here in dispute be and same is hereby affirmed.

(s) Frederick V. Follmer
United States District Judge

APPENDIX D

STATUTES, GENERAL ORDER 37, AND FEDERAL RULE OF CIVIL PROCEDURE 15(a)

1. 11 U.S.C. 1 (11) provides:

"The words and phrases used in this title and in proceedings pursuant thereto shall, unless the same be inconsistent with the context, be construed as follows:

* * * * * * * *

(11) 'Creditors' shall include anyone who owns a debt, demand, or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy;"

2. 11 U.S.C. 11(a) provides:

"The Courts of the United States hereinbefore defined as Courts of bankruptcy are hereby created Courts of bankruptcy and are hereby invested, within their respective territorial limits as now established or as they may be hereafter changed, with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title, in vocation, in chambers, and during their respective terms, as they are now or may be hereafter held".

3. 11 U.S.C. 92(a) provides:

"Creditors shall pass upon matters submitted to them at their meetings by a majority rate in number and amount of claims of all creditors whose claims have

been allowed and who are present except as herein otherwise provided".

4. 11 U.S.C. 93(a) provides:

"A proof of claim shall consist of a statement, in writing and signed by a creditor, setting forth the claim; the consideration therefor; whether any and, if so, what securities are held therefor; and whether any and, if so, what payments have been made thereon; and that the claim is justly owing from the bankrupt to the creditor. A proof of claim filed in accordance with the requirements of this title, the General Orders of the Supreme Court, and the official forms, even though not verified under oath, shall constitute prima facie evidence of the validity and amount of the claim."

5. 11 U.S.C. 93(n) provides in part:

"Except as otherwise provided in this title, all claims provable under this title, including all claims of the United States and of any State or any subdivision thereof, shall be proved and filed in the manner provided in this section. Claims which are not filed within six months after the first date set for the first meeting of creditors shall not be allowed * * * when in any case all claims which have been duly allowed have been paid in full, claims not filed within the time hereinabove prescribed may nevertheless be filed within such time as the Court may fix or for cause shown extend and, if duly proved, shall be allowed against any surplus remaining in such case."

6. General Order 37 of the Orders of the United States Supreme Court promulgated under the Bankruptcy Act, provides:

"In proceedings under the Act the Rules of Civil Procedure for the District Courts of the United States shall, in so far as they are not inconsistent with the Act or with these general orders, be followed as nearly as may be. But the Court may shorten the limitation of time prescribed so as to expedite hearings, and may otherwise modify the rules for the preparation or hearing of any particular proceeding."

7. Federal Rule of Civil Procedure No. 15(a) provides in part:

"A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *"